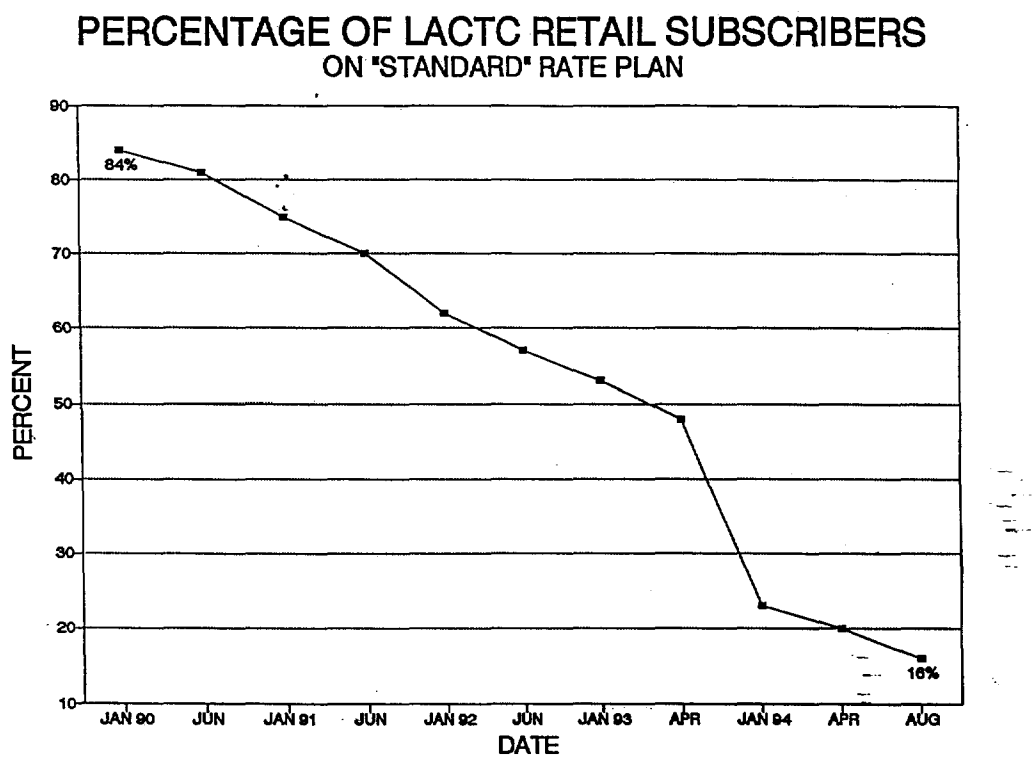
customer may sign up for more time than he/she actually needs, the fact is that under L.A. Cellular's tariffs, customers are largely free to migrate to other usage levels without penalty as their needs change.

The net impact of all of this can be measured in a variety of ways. The most obvious is the rate of migration to alternative plans. The undeniable fact is that the "basic" or "standard" plan is no longer either basic or standard, in that only 16% of L.A. Cellular's customers make use of it. Fully 84% have migrated to lower-priced alternatives.[16] Thus:

Figure 1



16 The Charles River Report at page 13 shows a similar trend in other California markets.

One might also compare the average rates actually paid by L.A. Cellular's customers with the "basic rates" complained of by the CPUC. In contrast to the basic monthly access charge of $45, the average access charge paid by L.A. Cellular retail customers is actually $32.84. Moreover, while the basic rate stated in the tariffs is .45 (peak)/.27 (off-peak), or a blended rate of $.405/minute (assuming 75% peak usage), the actual average blended rate being paid by retail customers as a group is only $.35/minute.

Yet another way of evaluating price competition in Los Angeles is to compare the amounts that would be paid at various times under the best available plan by a typical user. While the average user profile has varied over time, a "typical" L.A. Cellular end user in the recent past has had average usage of 170 minutes per month, of which 75% is "peak", and 25% "off-peak".[17] Such a user would pay $113.85

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[17] The CPUC Petition and Decision give great weight to a reseller analysis of rates charged to a hypothetical customer with "a reasonable calling pattern" of 30 minutes per month, including 10 minutes of off-peak use. See, for example, Petition at page 43-46 and Decision 94-08-022 (Appendix 1). The calling pattern is in no way typical of L.A. Cellular users, whose average use is considerably greater. Moreover, users desiring cellular for personal or emergency uses only would tend to have a higher percentage of off-peak calls than assumed by the reseller hypothetical, and would enjoy more favorable rates through L.A. Cellular's Night Owl or Security Plans.

Arguments by the CPUC and resellers based on the user profile described in Appendix 1 to the Decision have also been mooted by AirTouch's Advice Letter 428, filed on September 16, 1994, announcing a "Super Value Starter Plan" which would reduce the monthly charge to the user in question from $45 to $36.06. L.A. Cellular responded on September 19 with a similar filing. The net result -- a twenty percent reduction in rates for the user group described by the CPUC -- is a classic example of a pro-competitive initiative followed by an immediate response by the rival carrier.

under basic plan rates, i.e. $45 plus 170 x .405. However, as noted above, fully 84% of end users have migrated to alternative plans. These plans result in the following savings:

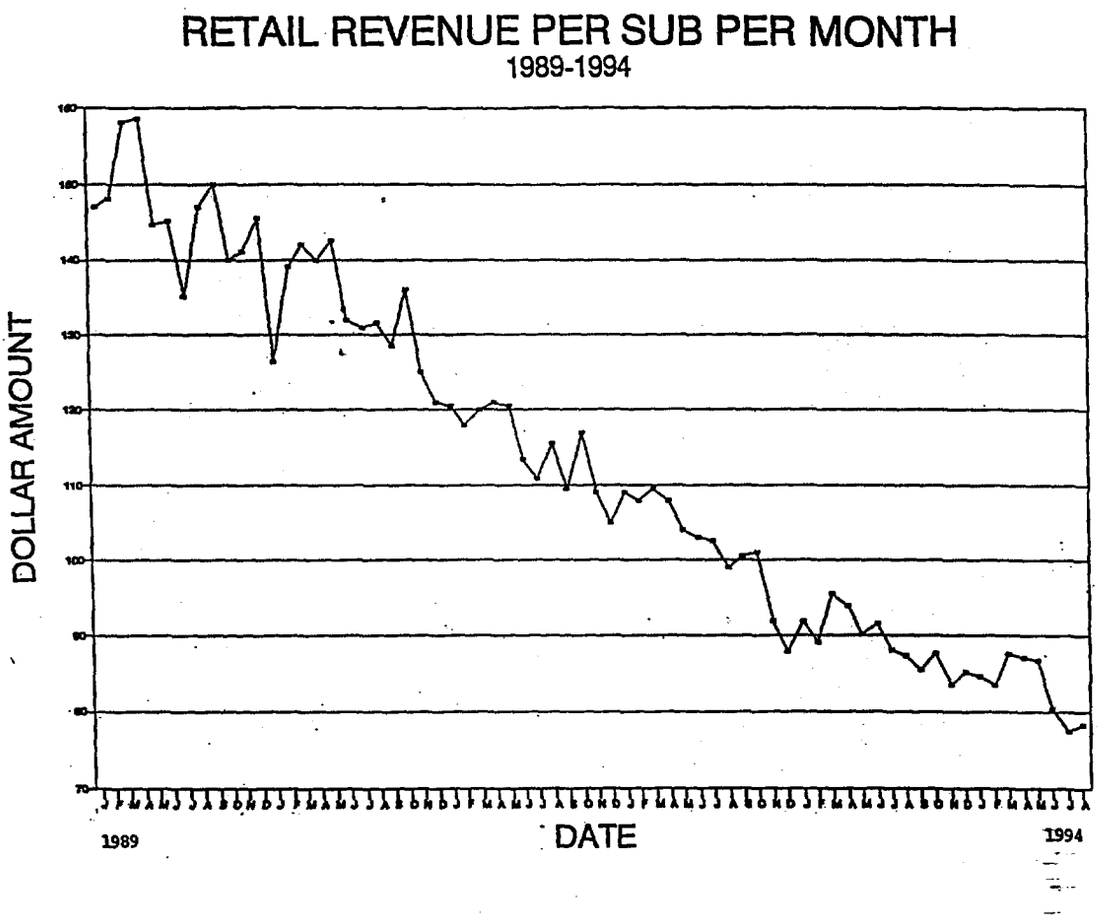
Fig. 2

June, 1984 (Basic Plan):	$113.84 (.67/min.)[18]
April, 1987 (Corporate/Association: rates without contract):	$ 95.60 (.56/min.) (-16.4%)
May 1993 (Value Service Plan with contract):	$ 99.99 (.59/min.) (-11.9%)
November, 1993 (Dual Mode Value Service Plan with contract):	$ 89.99 (.53/min.) (-20.8%)
November, 1993 (Dual Mode Corporate/ Association Plan with contract):	$ 74.15 (.44/min.) (-34.3%)

[18] Prices are expressed both in terms of the total monthly charge and as a per minute charge. The per minute charges are blended, i.e. they include amounts due for both access and usage. Note also that the enumerated plans in Figure 2 are not exclusive and that many other plans and promotions were introduced. See, e.g. Appendix 1 which lists the eighty-three plans and promotions filed by L.A. Cellular between mid-1990 and the present.

As a result of the introduction of lower priced plans, and the company's successful appeal to the consumer market, retail billings per end user unit have fallen from $147/month in 1989 to less than $80 per month today. Thus:

Fig. 3



The above data demonstrates that in absolute dollar terms, billings per customer have decreased by 44% since 1989, that access charges have fallen by 27%, and per

minute charges have fallen by 13.6% when compared to the Company's original basic service rates. When adjusted for inflation, the real amounts paid for cellular service have declined even more precipitously. Thus:

Fig. 4

	Basic Rates 1987)	Actual Rates (1994)	Actual Rates (Adjusted for Inflation)[19] (1994)
Monthly Access:	$45	$32.84 (-27%)	$26.44 (-41%)
Usage (blended per minute)	.405	.35 (-13.6%)	.28 (-31%)

One last point goes entirely unremarked by the CPUC, i.e., the decline in roamer charges to cellular users who place calls while located outside of their home CGSAs. Originally, such charges, which may amount to as much as 50% or more of carrier revenue, included a daily "registration fee" of $2-$3 plus usage charges of $.50-$.90/minute. Today the trend is toward intercarrier agreements by which roamer rates are reciprocally reduced, or where such agreements are not possible toward home carrier "re-rating" of host carrier charges to lower levels. The result has been the creation of vast areas (comprising multiple CGSAs) where roamer charges have been abolished entirely, or greatly reduced.

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[19] Adjustment assumes 1989 prices at 100 and July, 1994 at 116.5, per U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index (all urban consumers).

This trend has been the direct result of competition, which in this area has actually become more intense as adjacent markets have come under related control. For example, GTE Mobilnet has created a wide area service network ranging from Sonoma County (ninety miles north of San Francisco) to Santa Barbara County, which is nearly three hundred miles south of San Francisco. In this area GTE customers may place calls, essentially at home rates. This has occurred even though the company's official tariffs continue to reflect "basic" roamer charges of $2.00/day plus $.50/minute. AirTouch as the "B" Block carrier in Southern California has created similarly preferential rates for its customers.

L.A. Cellular has responded with its own re-rating programs for subscribers who roam. The following shows the evolution of the rates paid by the company's customers while travelling in the adjacent markets of San Diego, Ventura, and Santa Barbara.[20]

Fig. 5

	San Diego	Ventura	Santa Barbara
1987	.60/minute	$2.00 daily access plus .50/minute	$2.00 daily access plus .50 minute
1994	Home Rates	Home Rates	Home Rates

[20] The resulting seven county area comprises 40,968 square miles and a total population of 17,741,000.

B. L.A. Cellular's Rate of Return Has Not Been Shown To Be Unreasonable:

The question of rates of return deserves far more careful study than it has been given by the CPUC. In earlier, more balanced times, the California Commission acknowledged that "rates of return vary for many reasons and do not per se indicate the absence of competition." First OII Decision at mimeo page 49. In Los Angeles, there is no question but that after an initial start-up period, both facilities-based carriers have been quite profitable. But in the case of L.A. Cellular, at least, such profitability is not that claimed by the CPUC and, indeed, is quite modest when account is taken of L.A. Cellular's depreciation tables and of amounts paid by the L.A. Cellular partners to acquire FCC licensed spectrum.

The CPUC claims (at page 48 of its Petition) that L.A. Cellular has enjoyed "an average annual after-tax accounting rate of return of 56.2% for the past five years." Appendix F, cited by the CPUC, does not explain the methodology leading to this conclusion, which is at variance with the audited annual financial reports furnished by L.A. Cellular to the CPUC. These financial statements in fact reveal an annual after-tax rate of return on wholesale operations that is about twenty percent less than that alleged by the California Commission. These statements also reflect the fact that L.A. Cellular utilizes a ten-year useful life for most of its plant. If the company had depreciated its plant over five years (as is the case for some operators) its average rate of return would have been further reduced. As in so many other areas, it would

have been far more helpful if the CPUC had openly described its calculations, and had based them on publicly available materials.

One thing is certain: the CPUC figures do not reflect actual returns to L.A. Cellular's investors. This is because partnership reports to the CPUC do not take account of the initial investments made by the partners in order to acquire and defend their cellular licenses. As the CPUC is well aware, FCC licensing procedures often led to fragmented ownership interests, particularly on the non-wireline side, and the need for ultimate operators to acquire such interests, piecemeal and at great cost. In the case of L.A. Cellular, the two current partners are affiliates of McCaw and BellSouth. McCaw acquired its interest through a purchase of shares in LIN Broadcasting Company at an amount which was reported to exceed $300 per POP. In the case of BellSouth, there were several transactions, the most important of which involved a purchase by BellSouth of the publicly traded shares of Mobile Communications Corporation of America. Since in each situation McCaw and BellSouth acquired many other assets, it is difficult if not impossible to calculate the amounts that are precisely assignable to the L.A. Cellular property.

Nonetheless, substantial sums were paid, and warrant a fair return for those who assumed substantial risks at a time when the future of cellular was far from certain.[21] The CPUC conceded as much in the First OII Decision at page 59 of the

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[21] It should be remembered that during the early 1980's, faith in cellular was at a low ebb - as evidenced by the fact that there were only six applicants for the "A" Block franchise in Los Angeles. As late as 1988, one commentator wrote "that [f]or cellular operators, the slow market development and persistently high costs

mimeo text and in Finding of Fact 14.[22] California's current Petition sings a different tune, however, and argues that amounts paid by operators for spectrum were excessive, and that the only possible explanation is an improper expectation of supra-competitive profits.

In an effort to avoid fruitless argument, various carriers have attempted to assign spectrum values that can be verified by reference to publicly available information about transactions where there could have been no expectation of monopoly (or duopoly) profits. McCaw, for example, cited the MCI investment in Nextel, which has been valued by analysts at $42.00 per POP. If a $42.00 valuation were assigned to the L.A. Cellular franchise, the result would be a $588-million addition to the nearly $400-million in plant and equipment investments reported to the CPUC. The returns would be the equivalent of only 10.6% on the partners' total investment in their system.

The CPUC objects to the Nextel transaction as a guide. To avoid quibbling, L.A. Cellular would urge the FCC to consider the results of its recent auction of narrowband PCS spectrum. There, 50 KHz/50 KHz paired nationwide frequencies were sold for $80-million to each of three high bidders. There can be no argument

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began to stretch their business plans to the breaking point. Projected paybacks were *from three to five years in major markets, stretching to . . . ten years or longer in* smaller markets". Calhoun, Digital Cellular Radio at page 14 (Antech House 1988).

[22] "[W]e recognized that profits may be earned by wholesale carriers due to their FCC-granted right to use scarce radio frequencies or spectrum. It is economically efficient and an appropriate spur to system and service expansion for wholesale carriers to keep those profits."

that the winning bidders anticipated either monopoly or duopoly profits from their investment. On the contrary, narrowband allocations are primarily for paging services, the market for which has been found -- even by the CPUC -- to be highly competitive.[23] In any event, the price paid at the narrowband auctions was the equivalent of $.0033 per KHz per POP (i.e., $80 million ÷ 100 KHz ÷ 240,000,000 POPs). Applying this valuation to the 25,000 KHz represented by a cellular franchise, and by the estimated 14,000,000 POPs in the Los Angeles SMSA yields a total value for L.A. Cellular's spectrum of $1,155,000,000, exclusive of any premium alleged by the Petition. When this imputed investment is added to the "nuts and bolts" investment (after depreciation) indicated on partnership returns, the resulting average rate of return for L.A. Cellular over the past five years is 7.46% per year.

Fig. 6

LOS ANGELES CELLULAR TELEPHONE COMPANY
RATES OF RETURN
(INCLUDING INVESTMENT IN SPECTRUM)

	1989	1990	1991	1992	1993
Rate Base*	$1,288,131,513	$1,366,161,696	$1,393,207,523	$1,406,481,303	$1,410,466,388
After-tax Income**	$ 64,903,704	$ 96,688,679	$ 114,743,744	$ 123,679,819	$ 117,062,349
Rate of Return	5%	7%	8.2%	8.8%	8.3%

* Rate base includes total assets net of depreciation and amortization, as reported to the CPUC, plus imputed investment in spectrum, minus non-cellular assets and current assets.

** Combined federal and state tax rate is assumed to be of 40.138%.

[23] D.92-01-016, Findings of Fact 16-27.

C. Cellular Rates and Rates of Return Are Substantially Lower In Other California Markets:

The question is whether market conditions in California "protect subscribers adequately from unjust and unreasonable rates...." 47 U.S.C §332(c)(3)(A)(i)(ii). In fact, as will be shown below, the CPUC has never allowed cellular market conditions to operate unimpeded. Nonetheless, as has been described, recent liberalization has led to substantial downward pricing trends.

The reasonableness of current rates must be viewed in the light of all relevant circumstances, and not just in terms of the profitability of one California market. One of these circumstances -- the chilling effect of prior service price regulation -- has been noted above, and will be discussed at length below. Other relevant factors include:

- The level of cellular rates as compared to conventional mobile telephone service charges. Cellular rates are generally higher than conventional mobile charges. Nonetheless, customer migration from conventional services has reached the point that Pacific Bell has filed a formal application with the CPUC seeking permission to withdraw its conventional offerings on the ground that they are non-compensatory. The implication is obvious: while allegedly high, cellular rates remain very attractive to consumers when compared to mobile service alternatives.
- The level of cellular rates when compared to coin-operated telephone charges. Pay phones are another traditional communications alternative for people on the move. In California, a two-minute, intra-LATA toll call placed from a pay phone

may cost up to 50 cents per minute. This is the result of relatively high intra-LATA toll rates, and of the three minute minimum charge generally imposed by pay phone operators. As demonstrated above, cellular usage rates in Los Angeles are substantially less than 50 cents per minute.

- Cellular rates as compared to landline telephone charges. Here, the comparison is somewhat more difficult because of CPUC-imposed distortions designed to reduce rates for residential telephone subscribers. What is clear, however, is the CPUC's recent finding that a direct embedded cost approach would result in monthly access charges of between $22 to $25 for landline subscribers, absent subsidies. Intra-LATA toll charges are not subsidized, and are currently as high as 40 cents per peak minute of use (non-operator assisted). Depending on the plan, retail cellular usage rates in Los Angeles range from .32 cents/minute to .45 cents/minute (peak), and from .19 cents/minute to 27 cents/minute (off-peak). Monthly access charges range from $25/month to $45/month at retail. Clearly, there are many situations in Los Angeles where a cellular call will result in charges that are no higher than intra-LATA toll calls placed on conventional landline networks.

There are other market-specific circumstances which are relevant to any discussion of the reasonableness of cellular rates. The Los Angeles market, by the CPUC's own concession, has the highest population of any in California, and the highest demand for mobile services. The carriers' systems are fully built in Los Angeles and serve a customer

base which exceeds the maximum capacity generally attributed to analog cellular systems. Finally, investment demands for analog buildout and digitization are far higher in Los Angeles than elsewhere. Notwithstanding these factors -- which tend to justify higher rates -- there has been a steady decline in charges to nearly all end users.

In San Francisco/San Jose, prevailing rates tend to be marginally lower than in Los Angeles. Elsewhere in California, where demographic characteristics are markedly different, cellular rates are far lower, as are rates of return. For example, the "typical user"[24] would incur the following monthly charges in the markets indicated. Figures in parentheses are the per-minute equivalents and include both access and usage elements.

Fig. 7

	Basic Plan	Best Available Plan	Alleged Rate of Return[25]
Los Angeles: (AirTouch)	$113.94 (.67)	$71.28 (.42)	33.8%
San Diego: (U S West Cellular)	91.62 (.54)	72.91 (.43)	2.9%
Fresno: (Contel)	80.20 (.47)	62.17 (.37)	10.7%
Sacramento: (AirTouch)	58.30 (.34)	53.99 (.32)	6.4%

[24] Assumes 170 minutes of usage per month, of which 75% is "peak", and 25% is "off-peak".

[25] Pursuant to Appendix F of the California Petition.

D. Cellular Prices and Returns -- A Summary.

The question, once again, is whether the prices charged for cellular service in California are unreasonable, considering all circumstances. To make its point, the CPUC has focused on so-called "basic" rates in Los Angeles. But it has ignored the fact that more than 80% of current customers in that city pay lower charges. The CPUC also gives little attention to rates in less congested parts of California. Elsewhere the "typical" customer may pay basic rates that are as much as 49% less than in Los Angeles. These rates are entirely reasonable, especially when compared to coin telephone charges, and/or to the intra-LATA toll rates currently paid by California end users.[26]

The CPUC also cites alleged rates of return for L.A. Cellular, while saying very little about lower rates of return elsewhere. L.A. Cellular has shown that even the alleged rates are wrongly calculated, and that they fail to take any account of up-front investments in spectrum acquisition. Such expenditures were quite real, and must be considered in coming to any judgment as to whether California's rates are the result of carrier rapacity or are instead a legitimate return on total investment.

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[26] Cellular rates generally include all landline charges for intra-LATA calls. The San Francisco and Los Angeles markets embrace, respectively, LATAs 1 and 5, each of which is tens of thousands of square miles in area. Toll rates are as high as $.40/minute for landline calls within these areas.

E. By the CPUC's Own Admission Carriers in Los Angeles Have Expanded Capacity to the Maximum Extent Reasonably Possible.

The discussion must now turn to the CPUC's extraordinary theory that carriers have deliberately suppressed expansion efforts in order to keep prices and profits abnormally high. The idea is not new. In the First OII Decision, the CPUC distinguished between profits arising from spectrum scarcity, and those derived from a failure by carriers to compete. The First OII Decision at mimeo page 59. The theory was unassailable. Where demand exceeds available capacity, price is a better allocation device than held orders, or service rationing. Where it could be shown that a carrier had used its best efforts to expand its system, and where profits are reinvested to increase capacity, carriers would be allowed to retain their profits. Where, however, carriers deliberately underbuilt their systems in order to limit available supply, and artificially to prop up prices, the CPUC would intervene. Id.

The First OII Decision proposed a capacity monitoring program which, if it had been implemented, might have enabled the CPUC to come to an intelligent judgment about the relationship of capacity shortages and allegedly high cellular profits. Indeed, the cellular industry supported the capacity monitoring suggestions of the First OII Decision. It was the CPUC itself which, in October, 1992 jettisoned the capacity monitoring approach in favor of cost-based, rate of return regulation of cellular pricing. Little explanation was offered, except that "collection of data as currently proposed could well be considered micromanagement of an industry," and that without a

"standard of reasonable system utilization" it would be "premature" to establish a capacity monitoring scheme. See Decision 92-10-026 at pages 11-12.

Having abandoned capacity analyses as a meaningful tool in 1992, the CPUC now revives its theory -- but as before fails to articulate a standard for correlating allegedly high prices with capacity utilization. As a result, the discussion at pages 50 et seq. of the Petition is singularly confused. Thus:

- At page 50, the Commission reiterates that "prices charged above marginal cost [are] not per se improper to the extent that cellular carriers use the profits to expand capacity and increase service availability..." However, pricing designed "to discourage full utilization", or "failure to invest in system expansion when it is economically justified" is declared to be improper. L.A. Cellular has no quarrel with these statements.
- However, the only evidence offered by the CPUC of such improper conduct is its statement that certain cell sectors in various markets are "underutilized" and that "basic economic principles dictate that when excess capacity exists, prices in a competitive market should drop." See Petition at pages 51-52.
- It is also said that on a national basis the number of subscribers per cell site has increased from December, 1985 to June, 1992. To the CPUC, this fact indicates that "additional customers could have been added to cellular systems had prices been lower." See Petition at pages 53-54.

- Somewhat inconsistently, the CPUC then states (also at page 54 of the Petition) that "the proliferation of discount plans proves that "carriers are actively seeking to increase usage of existing spectrum capacity."

One hardly knows where to begin. In a new industry, there will always be a lag between system construction and full utilization. Charles River Report at pages 29-30. It is also inherent in cellular design that all sites will have "excess capacity" during off-peak periods. It is also true that during peak periods some sites will be more congested than others. Because cellular units are by definition mobile, any attempt to load non-congested sites would have the inevitable effect of increasing blocking factors during peak hours at congested sites. In other words, the existence of both fully loaded and more lightly used sites is the mark of a soundly engineered system, and not the reverse.

This is not to say that cellular pricing cannot be used as a valid tool to manage system utilization. Off-peak pricing on California's systems is very low, and numerous discount plans exist for evening and weekend users. The CPUC seems to think (see Petition at page 43) that such discount plans are illegitimate -- the exact contrary is the case.

There are better measures of carrier diligence which the CPUC might have chosen to discuss -- but for the fact that they would have run counter to the Commission's pre-conceived thesis. The CPUC might have asked, for example,

whether the more profitable carriers have expanded their capacity to the maximum extent possible under existing analog technology.[27] Thus, it is generally recognized that a fully constructed analog system will, with current technology, accommodate somewhat more than 350,000 subscribers without undue blocking.[28] L.A. Cellular has more than a half million analog units now on its system -- hardly a sign of under-utilization, or of a failure to expand.

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[27] Digital conversion has begun in Los Angeles and San Francisco. However, in each case digital operations must co-exist with obligations to existing analog users. In L.A. Cellular's case, nearly all available spectrum is currently utilized by analog units. For L.A. Cellular, full digitization requires a long period during which existing customers will be encouraged to exchange their existing units for dual mode units -- a process which has been considerably impeded by the CPUC's own regulatory processes. See below at Section III.

[28] See generally Calhoun, Digital Cellular Radio at ages 113, et seq. (Antech House 1988)

The CPUC Petition might also have asked whether or not carrier profits have been reinvested to expand capacity. This information is publicly available, and in the case of L.A. Cellular would have shown:

Fig. 8

	Cum. After-Tax Wholesale Profits	Cum. Plant/Equipment Investment
1987	$ 1,623,801	$34,724,869
1988	55,641,532	63,718,281
1989	113,509,826	142,912,233
1990	198,941,838	239,052,880
1991	264,857,712	293,554,571
1992	379,115,818	337,020,917
1993	481,715,828	377,013,885

Or the CPUC might have addressed itself to cell site construction activities, which must be publicly noticed to the Commission. If it had done so for L.A. Cellular, it would have seen enormous efforts from 1987 forward to keep up with burgeoning demand. Thus:

Fig. 9

End of Year	No. of Sites	No. of Sectors
1987:	50	N/A
1988:	82	N/A
1989:	139	346
1990:	230	571
1991:	304	714
1992:	361	891
1993:	407	1,022
1994 (July):	510	1,090

Then there is the question of subscribers per cell site, which in L.A. Cellular's case have at all relevant times approached 1,000/site. While carrying capacities may be greater where usage is less, most industry experts would recognize this figure as close to the maximum number compatible with reliable service.

Build-out efforts have not only accommodated burgeoning demand. They have also resulted in a dramatic increase in the quality and extent of L.A. Cellular's service.

As depicted by Figures 10 and 11 (pages 38a and 38b), the L.A. Cellular system in 1987 comprised 43 sites serving less than 25% of the SMSA; at the end of 1993, there were 407 sites serving 75% of the territory, and 92% of the population of the largest market in the country. During this time, the nominal "basic" rate has not increased and the actual rates charged to customers have decreased significantly. Though it seems obvious that cellular competition may be through service quality as well as price, the CPUC ignores the point entirely.

Whatever standard is applied, an objective review by the CPUC would have revealed that:

- Far from being deliberately suppressed, cellular construction efforts are greatest in markets where congestion is greater, and prices higher. This is especially true of Los Angeles.
- In other markets, where there is less congestion, prices and profit levels are much reduced. Again this is precisely what would be expected in a properly functioning market.

Though it does not do so in its Petition, the California Commission in its Decision 94-08-022 concedes that "the most likely carriers to have reached full capacity would be cellular carriers in the most populous region of the state, Los Angeles."

> LACTC argues that for its own system, system coverage and capacity has expanded 'as quickly as humanly possible' since 1987. During this period, its investment has grown by a factor of about 10 while its end-user units have

FIGURE 10

Los Angeles Cellular Telephone Company

Sites On Air 1987-1988

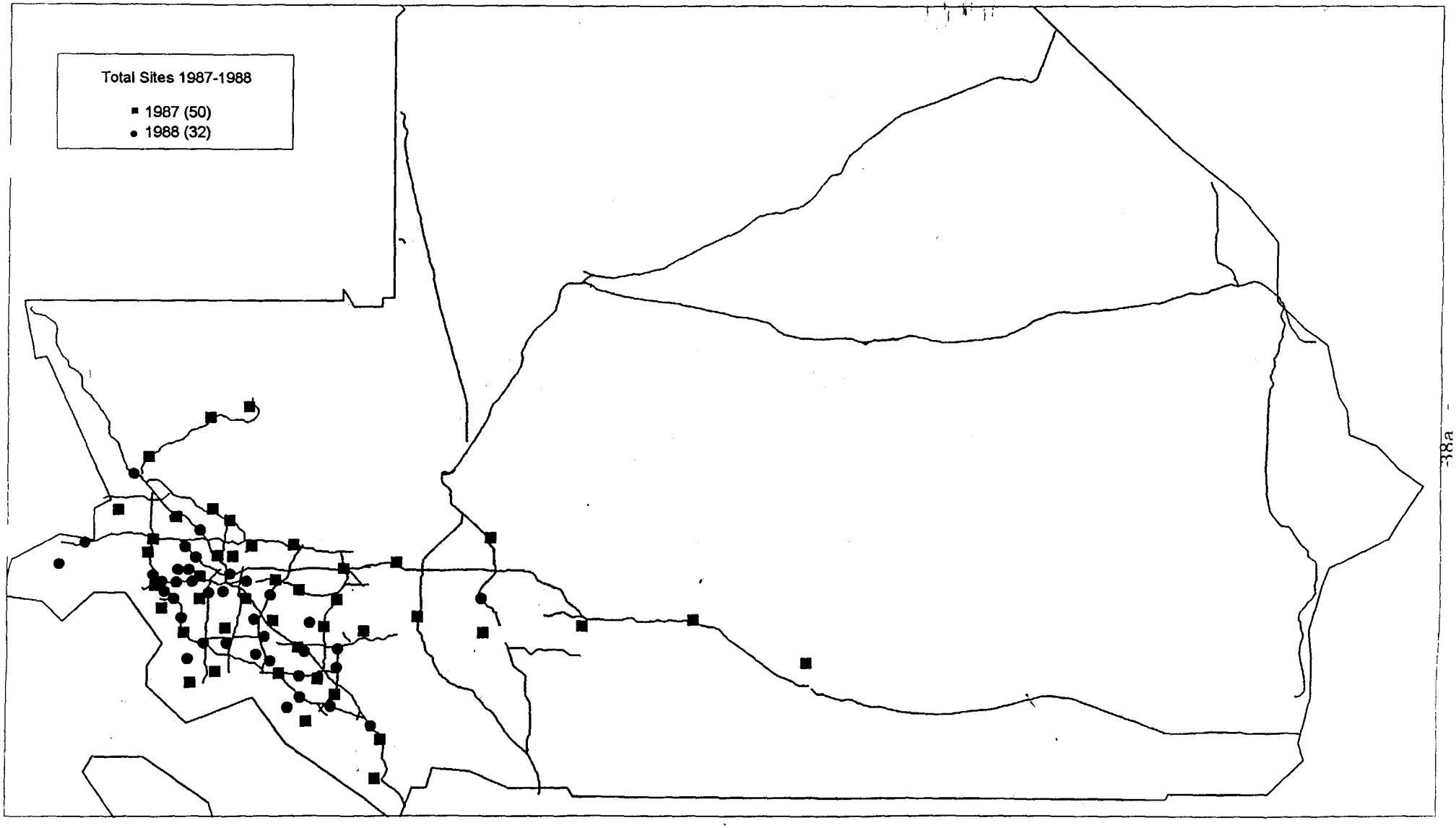
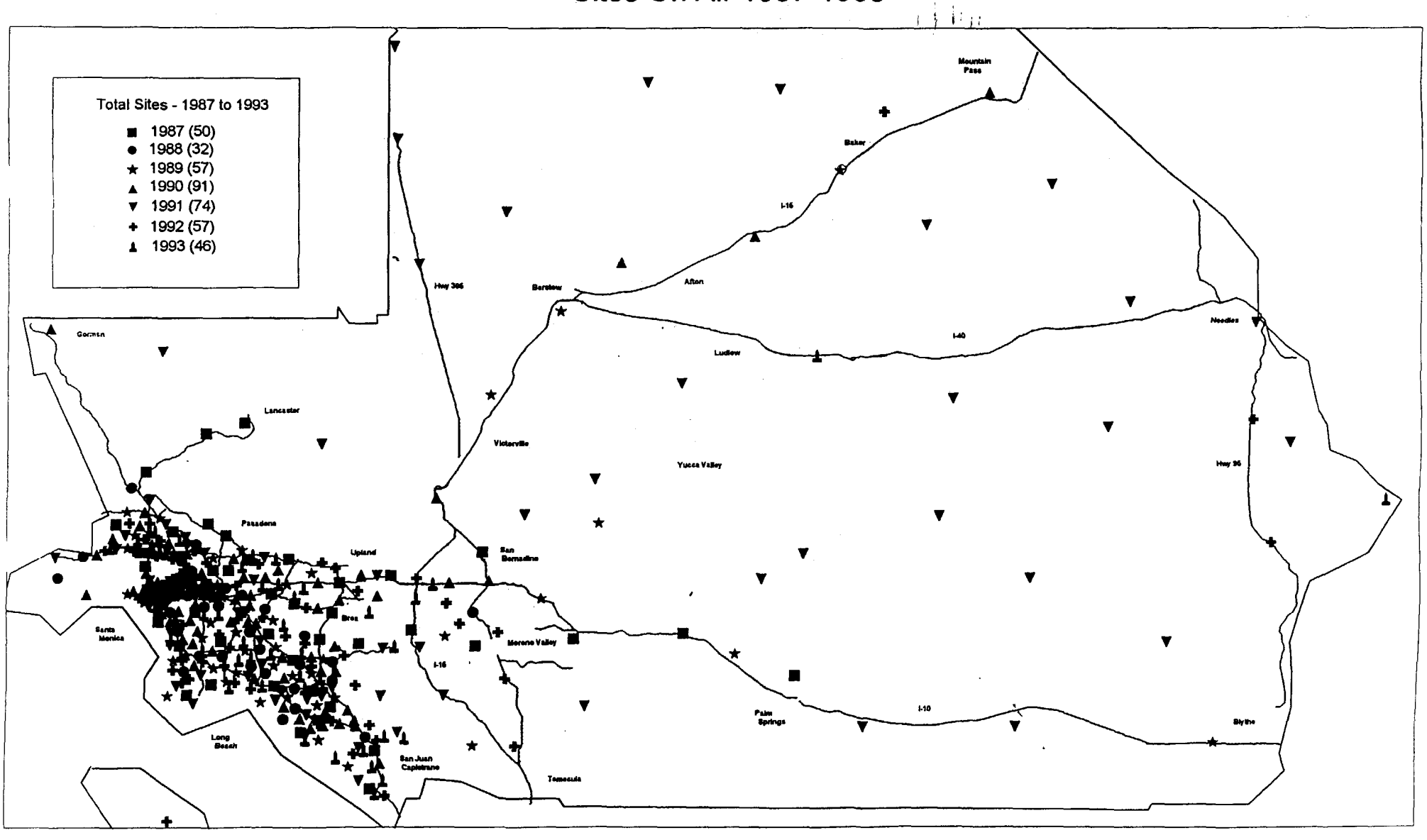


FIGURE 11

Los Angeles Cellular Telephone Company

Sites On Air 1987-1993



> increased from 17,000 to about 500,000 units in service. Yet, even assuming that capacity is a constraint in part of the L.A. market, this is not a state-wide condition. Decision 94-08-022 at page 59 (mimeo).

The Commission's concession as to Los Angeles is in fact a refutation of its entire case that high cellular prices are a result of deliberate underbuilding by California's carriers. The CPUC does not seem to contend that cellular rates are unreasonably high in medium and small markets like San Diego, Sacramento, Santa Cruz, or Fresno, where excess capacity exists, and both rates and returns are lower. Instead, the CPUC's arguments about a lack of competitiveness relate to the largest two markets, and especially to Los Angeles. Yet it is precisely Los Angeles where the Commission has admitted that existing systems are fully built out. There, usage exceeds the maximum which might be expected on fully-built analog systems. There, customer demand is unabated, and the CPUC has admitted that demand has been more than twice as great as forecast by D.90-06-025. See Petition at p. 14. In short, arguments about underbuilt systems, and suppressed demand do not apply, by the CPUC's own admission, to the one market where prices are the highest.[29]

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[29] The CPUC Petition, at page 51 states:

> "If cellular carriers' pricing policies were a result of spectrum scarcity alone, this would imply they are already serving at maximum capacity, given the scarce FCC spectrum which they are licensed to use. If prices were further reduced below the level associated with maximum capacity demand, then demand could be overstimulated beyond the available supply of calling capacity. Thus, to avoid a rationing of service, or risk of service interruptions, it would be appropriate for cellular carriers to keep profits resulting from pricing service to attract demand up to the limits of available capacity."

III.

THE CALIFORNIA PETITION IS SILENT ABOUT THE CPUC'S OWN RESPONSIBILITY FOR CHILLING PRICE COMPETITION IN THE CELLULAR MARKET

> "Regulation . . . tends inherently to be protective of monopoly, passive, negative, and unimaginative. The concentration by commissions on the the rate-base and rate of return has been far disproportionate to their importance compared with other dimensions of performance, has weakened initiative, and introduced distortions". Kahn, The Economies of Regulation: Principles and Institutions, v.II at page 325-26 (Wiley & Sons 1971).

Aside from a few oblique references, California is strangely silent about the role of regulation in discouraging pricing initiatives and delaying the evolution of the cellular market. References to recent reforms ignore the fact that prior to April, 1993, and to a lesser extent today, cellular carriers have found themselves entangled by regulations which, promulgated in the name of consumer protection, have in fact been used to protect competitors at the expense of the consumer. California has realized only belatedly what commentators have known for years; i.e. that rate regulation can easily be perverted, and can become a shield for the less efficient.

Some of California's procedural bars to rate changes have been noted above. Prior to 1990, there could be no rate change of any sort without forty days' advance notice. First OII Decision, Finding of Fact 93. After October, 1990 there was a provision for so-called "temporary" tariffs, but this provision was soon emasculated by the Commission's so-called "ten percent rule" i.e. no rate element could be reduced by more than ten percent of the average customer's monthly bill. For example, where